



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 13

[Docket No. FWS-HQ-ES-2021-0137; FF09E22000 FXES11130900000 212]

RIN 1018–BF63

Wildlife and Fisheries; Compensatory Mitigation Mechanisms

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The U.S. Fish and Wildlife Service (Service) seeks comments to assist us in developing a proposed rule establishing objectives, measurable performance standards, and criteria for use, consistent with the Endangered Species Act, for species conservation banking.

The terms “you” or “your” in this document refer to those members of the public from whom we seek response. The terms “we” and “us” refer to the Service.

DATES: Submit comments on or before [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: *Comment submission:* You may submit comments, identified by docket number FWS-HQ-ES-2021-0137, by any of the following methods:

- *Electronically:* Go to the Federal eRulemaking Portal:

<https://www.regulations.gov>. In the Search box, enter FWS-HQ-ES-2021-0137, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on “Comment.”

- *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: Docket No. FWS-HQ-ES-2021-0137; U.S. Fish and Wildlife Service; MS: PRB/3W; 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We will not accept email or faxes. All submissions received must include the agency name and docket number for this rulemaking. For detailed instructions on submitting comments and other information on the rulemaking process, see **Public Participation** in **SUPPLEMENTARY INFORMATION**.

Document availability: For access to the docket to read background documents or comments received, go to <https://www.regulations.gov> and search for FWS-HQ-ES-2021-0137.

FOR FURTHER INFORMATION CONTACT: Craig Aubrey, Chief, Division of Environmental Review, U.S. Fish and Wildlife Service, 703–358–2442. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

Section 329 of the 2021 National Defense Authorization Act (NDAA 2021) (Pub. L. 116-283, Jan. 3, 2020) requires the Service to issue regulations of general applicability establishing objectives, measurable performance standards, and criteria for use for species conservation banking programs, consistent with the ESA. The NDAA 2021 states that, to the maximum extent practicable, the regulatory standards and criteria shall maximize available credits and opportunities for mitigation, provide flexibility for characteristics of various species, and apply equivalent standards and criteria to all mitigation banks. The NDAA 2021 also requires us to publish an advance notice of proposed rulemaking (ANPR) within 1 year of enactment of the NDAA 2021.

The Service has a long history collaborating with both private and public entities in the establishment and oversight of mitigation and conservation banks, and other compensatory mitigation projects. In 2003, we issued the Guidance for the Establishment, Use, and Operation

of Conservation Banks (68 FR 24753, May 8, 2003), which was intended to help Service personnel evaluate conservation bank proposals. One of the stated goals of the ESA is to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” Conservation banks contribute to the recovery of listed species and help reduce threats such as habitat fragmentation and lack of habitat connectivity by consolidating and managing priority habitat areas in a reserve network. So far, 173 Service-approved conservation banks have protected approximately 260,000 acres of habitat for 57 species listed under the ESA.

As the conservation banking program continues to grow, it is important to ensure consistency, transparency, and predictability for project proponents and mitigation providers. The development and application of equivalent standards and criteria for conservation banks and all habitat-based compensatory mitigation mechanisms is in the interest of industry, mitigation providers, and species conservation. This proposed rule will focus on conservation banking programs for ESA-listed, proposed, and candidate species, including maximizing available credits.

Conservation banks typically adhere to basic standards for providing real estate protection, ecological management, and funding. The Service intends to apply equivalent standards to all habitat-based compensatory mitigation mechanisms (including conservation banks, in-lieu fee programs, and permittee-responsible mitigation) for covered species.

Species conservation banks sometimes overlap with wetland mitigation banks established under the joint regulation Compensatory Mitigation for Losses of Aquatic Resources (33 CFR parts 325 and 332, and 40 CFR part 230) (73 FR 19594, April 10, 2008; hereafter the “2008 Rule”) administered by the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency, so the Service intends this proposed rule to maintain compatibility with the 2008 Rule. The 2008 Rule applies equivalent standards to each covered mitigation mechanism (in-lieu fee programs, permittee-responsible mitigation, and mitigation banks) to help ensure

compensatory mitigation results in successful, durable, and sustainable resource functions regardless of mechanism.

The proposed rule will not modify any of the Service's existing authorities for either recommending or requiring mitigation. Instead, it will address regulatory standards and criteria for compensatory mitigation mechanisms, consistent with the ESA and its implementing regulations.

The Service will analyze the proposed regulation in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR 46.10–46.450), and the Department of the Interior Manual (516 DM Chapters 1–15).

Information Requested

The Service requests your comments regarding the content of the proposed regulation, including appropriate objectives, measurable performance standards (including metrics for ecological benefit and additionality) for habitat and species, and criteria for use of credits offered by bank operators to satisfy a mitigation requirement consistent with the ESA. We also request your comments regarding how to ensure the regulatory standards and criteria maximize the accrual of functions measured as available credits and opportunities for mitigation to the maximum extent practicable, provide flexibility for characteristics of various species, and apply equivalent standards and criteria such as real estate protections, ecological management, and funding to all species conservation banks. We also request comment on how best to account for risk and uncertainty when conservation banks are used to achieve a given conservation objective.

The Service is particularly interested in comments on the following:

(1) What level of detail should be in the proposed rule to ensure equivalent standards are consistently applied to all forms of compensatory mitigation, including equivalence in covering the costs of mitigation whether they are on public or private lands?

(2) What level of detail should be in the proposed rule regarding durability and additionality standards to both achieve equivalent standards across mitigation mechanisms and provide species conservation?

(3) How should the proposed rule incorporate monitoring, financial assurances, and publicly accessible mitigation data tracking systems to ensure a compensatory mitigation mechanism is meeting its performance standards?

(4) What are the hurdles to species bank establishment that are within the Service's authority to address through regulation?

(5) How should the proposed rule align with 2008 Rule provisions to maintain compatibility between mitigation banks and species banks where appropriate?

(6) How should the Service address potential bank projects on Federal and Tribal lands or on other lands with unique ownership considerations and/or some degree of existing protection?

Public Participation

We seek information from knowledgeable members of the public, including mitigation providers, small businesses, Tribes, developers, and others. All submissions received must include the Service docket number for this document. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal information—may be made publicly available. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Shannon A. Estenoz,

Assistant Secretary for Fish and Wildlife and Parks.

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